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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1205

AMERICAN AIRLINES, INC.
TRANS WORLD AIRLINES, INC., *Petitioners,*

v.

WORLD AIRWAYS, INC., *Respondent.*

BRIEF OF INTERVENORS CITY OF OAKLAND, BOARD OF PORT COMMISSIONERS, AND OAKLAND CHAMBER OF COMMERCE IN OPPOSITION TO THE PETITION FOR CERTIORARI

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The City of Oakland, Board of Port Commissioners, and Oakland Chamber of Commerce, intervenors in the court below, submit this brief in opposition to the petition for certiorari filed herein by American Airlines, Inc. and Trans World Airlines, Inc.

STATEMENT OF THE CASE

Petitioners' statement of the case is accurate in its factual respects, but is somewhat confused by being intertwined with argument. The sole issue in the case is one of statutory construction, namely, whether the 1962 amendments to the Federal Aviation Act of 1958

(Pub. L. No. 87-528) should be construed to preclude the Civil Aeronautics Board from issuing, under any circumstances, a certificate for scheduled air transportation to an air carrier holding a certificate for "supplemental" (popularly known as "charter") air transportation. The Board read the statute to tie its hands in this respect, but the court below did not. These intervenors submit that the court below was correct; that, while by either construction the statute is not a model of clarity, its improvement is appropriately for the Congress to undertake; and that, in any event, choice between the two constructions does not rise to the dignity of an important question of federal law which should be settled by this court.

This proceeding arises as follows: On April 2, 1975, respondent World Airways, an air carrier certificated to engage in "supplemental" service, filed an application with the Civil Aeronautics Board seeking certification to perform regularly scheduled transcontinental service between Newark and Baltimore on the East Coast and Ontario and Oakland, California on the West. World contemplated a high volume service, utilizing "satellite" airports, with a low fare. It stated that it would not be willing to surrender its supplemental certificates if granted scheduled route authority. On January 23, 1976, the Board dismissed World's application without reaching the merits, holding that the 1962 amendments to the Federal Aviation Act of 1958 preclude issuance of a certificate for scheduled authority to a carrier holding "supplemental" authority, C.A.B. docket 27693, Order 76-1-88 (Jan. 23, 1976).

Sections 401(d)(1) and (2) of the Federal Aviation Act govern the certification of scheduled route authority, that is, authority to provide individually ticketed service on a schedule.[1] These sections provide that an applicant must be an "air carrier", "fit, willing, and able" to provide the service, and that the requested service must be "required by the public convenience and necessity." "Air carrier" is defined as a "citizen of the United States who undertakes * * * to engage in air transportation * * *", section 101 of the Act, 49 U.S.C. § 1301 (1970).

The 1962 amendments to the Act added section 401 (d)(3), authorizing certification for "supplemental air transportation," defined to include charter but not individually ticketed authority, section 101(36) of the Act, 49 U.S.C. § 1301 (36) (1970). This provision (section 401(d)(3)) requires that an applicant must be "fit, willing, and able" to provide the service, and that the service be "required by the public convenience and

[1] Section 401(d)(1) controls the award of permanent authority, while 401(d)(2) governs temporary authority. These sections provide in full:

> (d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.
>
> (2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provision of this chapter and the rules, regulations, and requirements of the Board hereunder.

necessity"; it also provides that the applicant must not be holding "a certificate under paragraph (1) or (2) of this subsection [section 401(d)]."[2] In other words, an air carrier holding scheduled route authority may not also acquire supplemental authority; but the section does not by its terms bar supplemental carriers from acquiring scheduled authority. As stated by the court below, "The issue in this case thus becomes whether the general purposes of the 1962 amendments would be furthered by reading this converse limitation into the Act." (slip. op. 5)

ARGUMENT

I. Petitioners' Contention That The Court Below Has Failed To Accord Proper Deference To The Administrative Interpretation Is Misplaced.

The primary thrust of the petition is that the court below failed to show proper deference to the interpretation adopted by the Civil Aeronautics Board of "its own statute". This contention would be appealing in the context of a course of discretionary action within the confines of the statute, but it is inapplicable to an

[2] Section 401(d)(3) provides in full:

(d)(3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this chapter.

interpretation of the statute itself. That is a pure question of law, as to which the courts owe no deference to anybody. Professor Jaffe, a leading commentator on the subject of judicial review, states:

> "The distinction between fact and law is vital to a correct appreciation of the respective roles of the administrative and the judiciary. The administrative is the sole fact finder. * * * On the other hand, the administrative and the judiciary share the role of law pronouncing and law making. They are in partnership. *The court may supersede the administrative and itself determine the question of law; it is the senior partner.*" (Emphasis supplied) Louis L. Jaffe: *Judicial Review: Question of Law,* 69 Harv. L. Rev. 239 (1955).

Mr. Justice Jackson expressed this concept to similar effect:

> "[A]dministrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And *what action is, and what is not, within the law must be determined by courts . . .*" (Emphasis supplied) (Dissenting Op. in *SEC* v. *Chenery Corp.,* 332 U.S. 194, 215 (1947).

It is not true, however, that the court did fail to show "deference" to the Board's interpretation. The care and depth with which the court considered the problem is itself the highest form of deference. The court simply could not reach the same conclusion. Thus, with respect to the crucial question of the construction of the 1962 amendments, the Board relied in part on

the fact that its policy prior to 1962 had been to prohibit an air carrier from simultaneously holding both scheduled and supplemental authority. The court below states as to this

> "With all respect, we do not find the Board's pre-1962 interpretation of the Act persuasive support for its reading of the 1962 amendments. It seems reasonable to suppose that a policy formulated at the time the Board was attempting to justify an exemption of supplemental carriers from the provisions of the Act would not survive the establishment of a clear statutory basis for awarding supplemental certificates. Certainly Congress did not think the prior Board policy was incorporated as such in the 1962 amendments: the express prohibition in section 401(d)(3) against acquisition of supplemental authority by a regular carrier would not have been necessary had Congress thought the Board's policy against dual certification was being carried forward by the legislation. We note, moreover, that until the instant litigation the Board had not formally determined the effect of the 1962 amendments upon its prior policy." (slip. op. 7, n. 5)

Throughout the court's opinion we find the same thoughtful and closely reasoned consideration of the Board's views. These intervenors submit that petitioners' argument as to lack of deference is without substance.

II. The Question Involved Is Not An Important Question Of Federal Law Which Should Be Settled By This Court.

Clearly it was important that the supplemental carriers know whether they were to be forever foreclosed from seeking scheduled carrier status, and it was important to the Board to know the answer to that question, in its administration of the Act. But the question itself is not one of major importance, even to the Board;[3] much less is it of the degree of jurisprudential importance justifying the attention of this court. Justice Brandeis said

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied . . .". (Concurring opinion in *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 84 (1936).

The question of law here involved has now been decided by a unanimous panel of the federal court most experienced in reviewing the actions of the Civil Aeronautics Board, including the judicial history of this very area, see *American Airlines, Inc.* v. *C.A.B.,* 235 F.2d 845 (D.C. Cir. 1956), cert. denied 353 U.S. 905 (1957), and *United Air Lines, Inc.* v. *C.A.B.,* 278 F.2d 446 (D.C. Cir.), vacated, 364 U.S. 297 (1960). We submit that this narrow question, of first impression, has received considerate and fully adequate attention.

III. The Decision Below Is Clearly Correct.

The Oakland parties submit that the decision below is clearly correct. We do not presume to repeat, or elaborate upon, the court's careful analysis and lucid opinion. We do wish, however, briefly to suggest that the result could also have rested upon a point of construction which Judge McGowan noted but did not rely upon. He states:

> "The Board cited three sections which deny benefits or impose additional requirements on "sup-

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[3] The Board did not petition for certiorari.

plemental air carriers," and found an anomaly in the fact that a carrier holding both route and supplemental authority would be, at one and the same time, "covered and not covered" by these sections. The intervening Oakland parties (the City of Oakland, the Board of Port Commissioners, and the Oakland Chamber of Commerce) urge us to eliminate this "anomaly" by construing these provisions to apply only to supplemental operations rather than to all services performed by an air carrier holding supplemental authority. The Oakland parties support their position by analogy to *National Association of Regulatory Utility Commissioners* v. *FCC,* 533 F.2d 601 (D.C. Cir. 1976), in which this court held that a cable television operator can be a common carrier with respect to some activities, but a non-common carrier with respect to others.

> We find it unnecessary to pass on the validity of the Oakland parties' interpretation, since we fail to see why the provisions in question raise an anomaly at all." (Slip Op. 12-13)

We add only that the Board's refusal here to even consider this contention is on all fours with the position espoused by the Federal Communications Commission in *National Association of Regulatory Utility Commissioners* v. *Federal Communications Commission,* 533 F.2d 601 (D.C. Cir. 1976) (hereinafter *Naruc*). As the court there expressed it:

> "The Commission argues that the two-way, non-video communications via cable, over which it has pre-empted state and local regulation, are not common carrier communications because they are carried on by entities (cable operators) previously

> adjudged to be non-common carriers.[26] 533 F.2d 608.

> "[26] 49 F.C.C. 2d at 1082.
> "It has been held several times that cable systems, operating in the characteristic broadcast retransmission mode, are not common carriers. *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 169, n. 29 (1968) . . . ."

The court below there rejected the Commission's "holistic view" of cable systems:

> "However, it has long been held that 'a common carrier is such by virtue of his occupation'; that is, by the actual activities he carries on. Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others." *Ibid.*

The Commission in *Naruc* had argued that to treat cable systems, at one and the same time, as common carriers and "noncarriers"

> "would lead to the absurd and illogical conclusion that the Commission has the authority to require the capacity for access cablecasting, including non-voice return communication, but is without authority to regulate the activity." 533 F.2d 614, n. 78.

Similarly here, the Board finds that it would be "unreasonable, let alone absurd" to allow, for example, the same entity to be eligible for subsidy with respect to route operations and ineligible with respect to supplemental operations. The remarks of the court below with respect to the Commission's "holistic view" in *Naruc* are equally applicable to the Board's theory here:

> "Yet the Commission offers no reason, save its own bruised sense of symmetry, in support of this conclusion." 533 F.2d 614.

We submit that the Board's reliance here on its "entity" construction to sustain its conclusion is as unfounded as was the Commission's view of the pervasiveness of the "noncarrier" entity status of TV cable systems in *Naruc*.

CONCLUSION

The Oakland parties accordingly submit that the petition for certiorari should be denied.

Respectfully submitted,

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